UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2014 MSPB 15

Docket No. AT-1221-11-0246-B-1

Carlton E. Hooker, Jr.,

Appellant,

v.

Department of Veterans Affairs,

Agency.

March 11, 2014

Carlton E. Hooker, Jr., St. Petersburg, Florida, pro se.

Karen L. Mulcahy, Esquire, Bay Pines, Florida, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed this individual right of action (IRA) appeal for lack of jurisdiction. For the following reasons, we DENY the petition for review and AFFIRM the initial decision AS MODIFIED by this Opinion and Order.[1]

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

BACKGROUND

¶2 In a July 27, 2011 Remand Order, the Board granted the appellant's petition for review and remanded this IRA appeal to the regional office for further adjudication. Remand File (RF), Tab 1; *Hooker v. Department of Veterans Affairs*, MSPB Docket Nos. AT-0752-10-0367-I-1, AT-1221-11-0246-W-1, Remand Order (July 27, 2011). The Board held that it was unclear whether the appellant sought to appeal his proposed removal or his effected removal and that the appellant should have the opportunity to clarify whether he was challenging the proposed removal. RF, Tab 1 at 3. The Board noted that the appellant had asserted that his IRA appeal pertained to his removal, while citing to his request for corrective action over the proposal for that action. *Id*. at 4. The Board also noted, among other things, that, if the appellant was pursuing an appeal of the proposal, the administrative judge should explain the jurisdictional requirements in an IRA appeal and afford the appellant an opportunity to establish jurisdiction. *Id*. Thus, the Board instructed the administrative judge to afford the appellant an opportunity on remand to explain the basis for his IRA appeal. *Id*.

¶3 On remand, after the receipt of evidence and argument by the parties, the administrative judge dismissed the appeal for lack of jurisdiction. RF, Tab 49, Initial Decision (ID) at 1, 6. The administrative judge found that the appellant, formerly a GS-6 Police Officer, was pursuing an appeal of the agency's action proposing his removal, which he received on November 16, 2009, and that his alleged protected disclosure was his November 18, 2009 complaint to the Office of Special Counsel (OSC). ID at 2, 5. The administrative judge held that, although disclosures to OSC may be covered by the Whistleblower Protection Act, the appellant's alleged disclosure to OSC could not have been a contributing factor in the proposed removal because the proposed removal occurred before the alleged disclosure. ID at 5. The administrative judge further found that, although the appellant asserted that the agency proposed his removal in reprisal for his participation in a whistleblower case initiated by another agency employee in

2008, and although such an assertion might constitute a prohibited personnel practice under 5 U.S.C. § 2302(b)(9), such an allegation was not considered reprisal for protected whistleblowing under 5 U.S.C. § 2302(b)(8). ID at 5-6.

ANALYSIS

The appellant has not established a basis for granting his petition for review.

¶4 The appellant asserts that the administrative judge did not address whether the proposed removal was a personnel action, Petition for Review (PFR) File, Tab 1 at 7-8, the agency committed two prohibited personnel actions under 5 U.S.C. §§ 2302(b)(8) and 2302(b)(9), *id*. at 8-9, the agency's action was based on harmful procedural error, and the administrative judge erred in rejecting certain exhibits relating to an OSC complaint filed by another individual, *id*. at 10-14, and in deleting evidence from the case file, *id*. at 18-21.[2] The appellant also contends that the administrative judge did not address the fact that an agency witness retracted statements that were used to support the proposed and effected removal, improperly separated two appeals that had been joined by the Board, and neglected to find that the appellant proved retaliation for equal employment opportunity activity in his removal appeal. *Id*. at 18, 22-26.[3] [4] [5]

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[2] The appellant submits on review numerous exhibits and other pleadings that were either already submitted in the record below, dated before the February 2, 2012 issuance of the initial decision with no showing that they were, despite the appellant's due diligence, not available when the record closed, or not material to the issues in this IRA appeal. *See* PFR File, Tabs 2-11, 15-16, 21, 23-25, 27, 29, 31-54. These documents, therefore, do not provide a basis for granting the petition for review. *See Meier v. Department of the Interior*, 3 M.S.P.R. 247, 256 (1980) (evidence that is already a part of the record is not new); 5 C.F.R. § 1201.115(d).

[3] After the record closed on review, the appellant filed a June 13, 2012 motion to stay the proceedings in his chapter 75 removal appeal pending the outcome of his petition for review in this IRA appeal. PFR File, Tab 56. We need not address this motion because an administrative judge has dismissed without prejudice the remanded chapter 75 removal appeal subject to refiling within 30 calendar days from the date the Board issues its decision in this IRA appeal. *See Hooker v. Department of Veterans Affairs*, MSPB Docket No. AT-0752-10-0367-B-2, Initial Decision (July 12, 2012).

¶5 Although the appellant contends that the administrative judge did not specifically address whether the proposed removal was a personnel action, the Board in its remand order had already made such a determination, RF, Tab 1 at 4, and the administrative judge, in any event, did not need to address that issue given his finding that the appellant did not show that his disclosure to OSC was a contributing factor in his proposed removal, ID at 5. Any allegations of harmful error by the agency are not within the authority of the Board to adjudicate in an IRA appeal. *See Garrett v. Department of Defense*, 62 M.S.P.R. 666, 674 (1994). Further, the appellant has not shown that the administrative judge abused his discretion when he returned certain voluminous, unsolicited documents submitted by the appellant that were not required to be filed with his appeal. The administrative judge informed the appellant that, if necessary, all or any portion of the rejected documents could be marked and resubmitted as part of the appellant's prehearing submission. RF, Tab 9; *cf. Doe v. Department of Justice*, 118 M.S.P.R. 434, ¶ 38 (2012) (an administrative judge has wide discretion to control the proceedings; there was no abuse of discretion by the administrative judge in rejecting seven volumes of exhibits submitted overnight before the date

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[4] The appellant has also filed, after the close of the record on review, three motions to file additional evidence. PFR File, Tabs 58, 60, 62. In these motions, filed on January 30, 2013, September 14, 2013, and October 23, 2013, the appellant asserts that he received evidence on September 25, 2012, relating to an administrative investigation that was referenced in his OSC complaint. *E.g.*, PFR File, Tab 58 at 3. Pleadings allowed on review include a petition for review, a cross petition for review, a response to a petition for review, a response to a cross petition for review, and a reply to a response to a petition for review. 5 C.F.R. § 1201.114(a). We deny the appellant's motions upon finding that he has not shown that the alleged new evidence is material to the dispositive issues in this case. *See* 5 C.F.R. § 1201.114(k), 1201.115(d).

[5] The appellant has filed a motion to join this case with a new Board appeal he filed in early 2014 that appears to relate to a different OSC complaint and an allegation by the appellant that the agency improperly removed him during the period when OSC should have been investigating his 2009 OSC complaint. PFR File, Tab 66. Because the appellant has not shown that joinder would expedite processing of the cases and not adversely affect the parties' interests, *see* 5 C.F.R. § 1201.36(b), we deny the motion.

of the scheduled prehearing conference); *Hoback v. Department of the Treasury*, 86 M.S.P.R. 425, ¶ 6 (2000) (it is well within the wide discretion of an administrative judge to issue very specific orders that require IRA appellants to clarify their allegations by providing detailed information concerning disclosures and personnel actions).

¶6 The appellant's contention that an agency witness retracted certain statements used to support the proposed and effected removal does not demonstrate error in the administrative judge's determination that the appellant's November 18, 2009 disclosure to OSC could not have been a contributing factor in the proposed removal, which the appellant received on November 16, 2009. Moreover, the appellant has not shown how his substantive rights were adversely affected by the administrative judge's denial of a motion to consolidate this appeal with an appeal filed by another individual, and his determination not to join this case with the appellant's chapter 75 removal appeal which, as set forth above, was dismissed without prejudice. RF, Tab 2, Tab 47 at 2-3; *see Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision); 5 C.F.R. § 1201.36(b) (an administrative judge may consolidate or join cases if doing so would expedite processing of the cases and not adversely affect the interests of the parties).

¶7 Accordingly, the appellant has not shown that the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the appellant's due diligence, was not available when the record closed. *See* 5 C.F.R. § 1201.115(a)-(d).

The provisions of the Whistleblower Protection Enhancement Act of 2012 permitting the filing of an IRA appeal based on an allegation that a personnel action was taken or proposed as a result of a prohibited personnel practice described at 5 U.S.C. § 2302(b)(9)(B) do not apply in this case.

¶8 Although not raised by the appellant on review, we modify the initial decision to address the administrative judge's findings regarding the appellant's allegation that the agency proposed his removal in reprisal for his participation in a whistleblower case initiated by another agency employee. The appellant asserted below that the agency proposed his removal "in retaliation for [his] participation in another whistleblower case initiated by [another employee] in August 2008." RF, Tab 26 at 21. The appellant raised this allegation in his OSC complaint, alleging that his complaint "goes back to August 9, 2008, when [the other employee] requested an internal affairs investigation under Whistleblower Disclosure guidelines," and an administrative board of investigation was convened at which the appellant and others were compelled to testify "in the Whistleblower Disclosure case." Initial Appeal File, Tab 4 at 8 of 17. As set forth above, the administrative judge found that, although this activity might constitute a prohibited personnel practice under 5 U.S.C. § 2302(b)(1) or (b)(9), it did not constitute reprisal for protected whistleblowing under 5 U.S.C. § 2302(b)(8), and therefore was not within the Board's jurisdiction. ID at 6.

¶9 After the issuance of the February 2, 2012 initial decision, Congress enacted the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-19, 126 Stat. 1465 (WPEA), which was signed into law on November 27, 2012, with an effective date of December 27, 2012. *See King v. Department of the Air Force*, 119 M.S.P.R. 663, ¶¶ 1, 3 (2013). Under 5 U.S.C. § 1221(a), as amended by WPEA § 101(b)(1)(A), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in 5 U.S.C. § 2302(b)(8) or § 2302(b)(9)(A)(i), (B), (C), or (D), seek corrective action from the Board.

Amended section 2302(b)(9)(B) provides that any employee who has authority to take, direct others to take, recommend, or approve any personnel action shall not, with respect to such authority, take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of "testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii)." Amended section 2302(b)(9)(A), in turn, prohibits the taking or failing to take, or threatening to take or fail to take, "any personnel action against any employee or applicant for employment because of -- the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation -- (i) with regard to remedying a violation of paragraph (8); or (ii) other than with regard to remedying a violation of paragraph (8)." Under 5 U.S.C. § 1221(e)(1), as amended by the WPEA and subject to the provisions of 5 U.S.C. § 1221(e)(2), in any case involving an alleged prohibited personnel practice as described under 5 U.S.C. § 2302(b)(8) or § 2302(b)(9)(A)(i), (B), (C), or (D), "the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure or protected activity described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) was a contributing factor in the personnel action which was taken or is to be taken."

¶10 It is unclear from the record whether the appellant's activity constitutes "testifying for or otherwise lawfully assisting" the other employee within the meaning of 5 U.S.C. § 2302(b)(9)(B), and whether the other employee was exercising any appeal, complaint, or grievance right granted by any law, rule, or regulation when he requested an internal affairs investigation under "Whistleblower Disclosure guidelines." Nevertheless, we need not resolve these questions because the applicable WPEA amendments do not, in any event, apply in a case such as this, which was pending before the Board when the WPEA was enacted.

¶11 The Board has held that the analytical approach set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), is the appropriate framework for determining whether the provisions of the WPEA should be given retroactive effect. *See Day v. Department of Homeland Security*, 119 M.S.P.R. 589, ¶¶ 7-9 (2013). In *Landgraf*, the Court addressed the question of the retroactive application of section 102 of the Civil Rights Act of 1991, which provided the right to a jury trial and the right to recover compensatory and punitive damages for violations of Title VII of the Civil Rights Act of 1964. *Landgraf*, 511 U.S. at 247. At the outset of its discussion of that issue, the Court noted the tension between the two established canons of statutory interpretation, i.e., the presumption against statutory retroactivity and the principle that courts should apply the law in effect at the time it renders its decision. *Id*. at 263-64 (internal citations omitted). In resolving that tension, the Court identified the following process for determining whether to apply a new statute to pending cases:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 280. While recognizing that, in many cases, "retroactive application of a new statute would vindicate its purpose more fully," the Court deemed that consideration insufficient to rebut the presumption against retroactivity. *Id*. at 285-86.

¶12 When Congress intends for statutory language to apply retroactively, it is capable of doing so very clearly. *King*, 119 M.S.P.R. 663, ¶ 9. Here, Congress

did not expressly define the temporal reach of section 101(b)(1)(A) of the WPEA, which provides that corrective action may now be sought from the Board in an IRA appeal when a personnel action is proposed to be taken as a result of a prohibited personnel practice described at 5 U.S.C. § 2302(b)(9)(B), and that the Board shall now order corrective action if protected activity described under 5 U.S.C. § 2302(b)(9)(B) was a contributing factor in a proposed personnel action. Rather, the statute provides that, with the exception of provisions not at issue in this appeal, the Act would become effective 30 days after its enactment. WPEA § 202. "A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf*, 511 U.S. at 257. If anything, the fact that the effective date was 30 days after enactment suggests that retroactivity was not intended. *King*, 119 M.S.P.R. 663, ¶ 9.

¶13 Despite clear indication in the legislative history that at least some in Congress were aware of the issue concerning the temporal scope of the WPEA, Congress did not expressly include language in the Act providing for its retroactive application. *Id.* Consequently, we must determine, under *Landgraf*, whether the provisions of the WPEA at issue impair a party's rights, increase a party's liability for past conduct, or impose new duties with respect to past transactions. *King*, 119 M.S.P.R. 663, ¶ 10. As discussed below, we find that retroactive application of section 101(b)(1)(A) of the WPEA, as it pertains to the prohibited personnel practice set forth at 5 U.S.C. § 2302(b)(9)(B), would be impermissible under *Landgraf* because it would increase a party's liability for past conduct as compared to pre-WPEA liability.

¶14 Under both the pre- and post-WPEA versions of 5 U.S.C. § 2302(b)(9)(B), any employee who had the authority to take, direct others to take, recommend, or approve any personnel action was prohibited, with respect to such authority, from taking or failing to take, or threatening to take or fail to take, any personnel action against any employee or applicant for employment because of testifying

for or otherwise lawfully assisting any individual in the exercise of any right referred to at 5 U.S.C. § 2302(b)(9)(A). Thus, the WPEA did not impose new duties with respect to past transactions that were directed at regulating the primary conduct of the parties, *cf. Caddell v. Department of Justice*, 66 M.S.P.R. 347, 354 (1995) (by classifying a decision to order psychiatric testing or examination as a "personnel action," the amendment to the Whistleblower Protection Act attached new legal consequences to events completed before its enactment and enlarged the category of conduct subject to 5 U.S.C. § 2302(b)(8) by establishing a new standard of conduct), *aff'd*, 96 F.3d 1367 (Fed. Cir. 1996), nor did it impair rights a party possessed before its enactment. In fact, in an otherwise appealable action, the Board has considered an appellant's allegation of a violation of 5 U.S.C. § 2302(b)(9)(B) as a viable affirmative defense. *See Canada v. Department of Homeland Security*, 113 M.S.P.R. 509, ¶¶ 12-17 (2010); *Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶¶ 15, 19-28 (2008); *Viens-Koretko v. Department of Veterans Affairs*, 53 M.S.P.R. 160, 163-64 (1992); *see also* 5 U.S.C. § 7701(c)(2)(B) (an agency's decision may not be sustained if the employee shows that the decision was based on any prohibited personnel practice described at 5 U.S.C. § 2302(b)).

¶15 Nevertheless, before the enactment of the WPEA, the Board lacked jurisdiction over such allegations raised in an IRA appeal, and therefore could not order corrective action in such cases. *See Wooten v. Department of Health & Human Services*, 54 M.S.P.R. 143, 146 (1992). As set forth above, the WPEA creates a new Board appeal right in IRA appeals for employees like the appellant who allege that a personnel action has been proposed to be taken as a result of a prohibited personnel practice described at 5 U.S.C. § 2302(b)(9)(B), and includes a new provision directing the Board to order such corrective action as the Board considers appropriate when such protected activity is a contributing factor in a personnel action. Such corrective action may include placement of the individual, as nearly as possible, in the position the individual would have been in

had the prohibited personnel practice not occurred, as well as back pay and related benefits, medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and cost), and shall include attorney's fees and costs. 5 U.S.C. § 1221(g)(1). Under these circumstances, we decline to apply in this case, which was pending when the WPEA was enacted, section 101(b)(1)(A) of the WPEA as it pertains to the prohibited personnel practice set forth at 5 U.S.C. § 2302(b)(9)(B), because doing so would increase a party's liability for past conduct as compared to pre-WPEA liability.

ORDER

¶16 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit.

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you want to request review of the Board's decision concerning your claims of prohibited personnel practices under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request the United States Court of Appeals for the Federal Circuit or any

court of appeals of competent jurisdiction to review this final decision. The court of appeals must receive your petition for review within 60 days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information about the United States Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.